In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1239

CARMEN BASTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was a fatal variance between the indictment, which charged petitioner with participating in a single conspiracy, and the evidence, which he alleges showed multiple conspiracies; and that in any event the trial court erred in failing to submit to the jury the question whether there was more than one conspiracy.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to transport or to cause to be transported in interstate commerce stolen semi-trailers of a total value in excess of $5,000, in violation of 18 U.S.C. 2314 and 371. He was sentenced to a term of five years'

imprisonment. The court of appeals affirmed (Pet. App. 1-31).[1]

The indictment charged that there was a single conspiracy (Pet. App. 2). The evidence, as set forth in the opinion of the court of appeals (Pet. App. 2-4), showed that Ronald Schoenneman[2] and petitioner entered into a scheme to steal semi-trailer vans from railroad yards and truck docks, remove all identification from them, create false titles and give them false serial numbers, and then resell them in Illinois and other states. At the start of the scheme petitioner arranged for the theft of the trailers, for each of which Schoenneman paid him $900; thereafter, Schoenneman and petitioner divided expenses and profits equally.

1. Petitioner contends that there was evidence of multiple conspiracies rather than of a single conspiracy, and that therefore he was prejudiced by a variance between the indictment and the evidence. In support of this contention, he asserts that certain testimony of Schoenneman, concerning stolen trailers that were supplied by unindicted co-conspirator Donald Svehla, referred to a separate conspiracy as to which there was no evidence of petitioner's participation (Pet. 5). Schoenneman testified, however, that the trailers supplied by Svehla were stored and sold together with those supplied by petitioner (Tr. 34-40) and that petitioner shared in the proceeds from the sale of Svehla's trailers (Tr. 87-88). As the court of appeals

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[1]Petitioner was one of fifteen defendants so charged, of whom one was severed prior to trial due to illness and eleven pleaded guilty. Of petitioner's two co-defendants who were tried with him, one was found not guilty and one was convicted and sentenced to a term of two years' imprisonment (Pet. App. 1-2).

[2]Schoenneman pleaded guilty and testified as the government's chief witness.

noted, "the proof here plainly demonstrated one overall agreement among the various parties to perform different functions in order to carry out the single objective of the conspiracy — the sale of stolen trailers" (Pet. App. 11).[3]

Petitioner also asserts that a variance was shown by certain other testimony of Schoenneman, which disclosed a separate conspiracy from 1968 to 1970, involving Schoenneman, Raymond Murray and Charles Garner, and as to which there was no evidence of petitioner's participation (Pet. 5-6). But it was the petitioner who elicited this evidence on cross-examination of Schoenneman, and the court of appeals correctly held that the defense cannot be allowed "to manufacture a variance through use of the cross-examination of the government's chief witness" (Pet. App. 12, n. 7).

The reason why a variance between an indictment charging one conspiracy and proof showing several may be fatal is that it permits the jury to impute to the defendant the acts and statements of individuals with whom the defendant may not have been involved, and thereby prejudices his case. But where, as here, the defendant himself elicits such evidence, any prejudice he may suffer is in direct consequence of his own trial tactics, and therefore is not grounds for a new trial.

2. Petitioner further contends that the court erred in failing to submit to the jury the question whether there was more than one conspiracy. In light of the fact that it

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[3] *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioner primarily relies, therefore is inapposite. There, the evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other, and the court instructed the jury that the acts and declarations of one conspirator bound all. Here, by contrast, the evidence showed petitioner's participation in the overall scheme, and the court's cautionary instruction (*infra*, at n. 4) eliminated any substantial possibility of prejudice by evidence of collateral transactions not directed toward the main scheme.

was petitioner who elicited the evidence of a separate conspiracy, however, the district court did not abuse its discretion in failing to submit to the jury the question of multiple conspiracies. In any event, as the court of appeals pointed out, the evidence showed only a single conspiracy.

The court's cautionary instruction[4] eliminated any substantial possibility that petitioner might be prejudiced by evidence of collateral transactions not totally directed toward the main scheme.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[4]The trial judge stated in part as follows (Pet. App. 11, n. 6):

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged participants. However, in determining whether a particular defendant was a member * * * of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts and declarations of other participants until it is established that a conspiracy existed and that he was one of the members.

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